No. 20099

COURT OF APPEALS

United States

for the Ninth Circuit

JACQUES ARLEY and CHARLOTTE ARLEY,
husband and wife,

Appellants,

v.

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Appellee.

Appeal from the United States District Court
For the District of Oregon

BRIEF FOR APPELLEE

CHARLOTTE HUNTER ARLEY,
901 S. W. King Avenue,
Portland, Oregon 97205
Attorney for Appellants.

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON,
KENNETH E. ROBERTS and
ROCKNE GILL,
Standard Plaza,
Portland, Oregon 97204,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-65

INDEX

TABLE OF AUTHORITIES

Page

Cases Cited

TABLE OF AUTHORITIES (Cont.)

STATUTES

RULES

TEXT BOOKS

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APPELLEE'S STATEMENT OF THE CASE

FACTS

Appellants Jacques and Charlotte Arley are husband and wife and were married in 1954 (Tr. 245). They own certain real property near Verdi, Nevada, which was damaged by fire on January 15, 1962 (R. 53, 54).

The appellants have resided in Oregon since some time in 1958, Jacques Arley being employed by the Mon-

tag Furnace Company in Portland (Tr. 179, 180). Jacques Arley maintains a bank account with the First National Bank of Oregon (Tr. 180). Both the parties' cars are registered in the State of Oregon (Tr. 180).

The appellants became acquainted with Roger Chaney some time in 1958 and thereafter obtained some of their insurance policies through him (Tr. 217). At the time Chaney operated an independent insurance agency as agent for Insurance Company of Oregon, Standard Accident and Ohio Casualty (Tr. 59). The appellants obtained a fire policy on the Verdi, Nevada property from Chaney, which was written by Standard Accident Insurance Company, effective January 28, 1958, for a period of three years. This policy was cancelled in November, 1960 (Tr. 183). From 1960 on until the time of the present action there was no insurance on the Verdi property (Tr. 184). Druing this period the appellants had considered having agents in Reno, Nevada take care of this coverage (Tr. 184).

In 1961 Chaney's business was purchased by the Larry Nelson Agency and Chaney became a solicitor for that agency (Tr. 12). The Nelson Agency represented various companies including Insurance Company of Oregon, Western Fire of Fort Worth, United Pacific, Ohio Casualty Company (Tr. 9). The Nelson Agency did not take over the fire policy on the Arleys' Verdi, Nevada property (Tr. 12).

In the summer and fall of 1962, Roger Chaney had various conversations with Mrs. Arley about placing fire coverage on the Verdi, Nevada property (Tr. 66, 73, 89).

Larry Nelson advised Chaney that he could not place the coverage through the Larry Nelson Agency as the agency did not have a Nevada license (Tr. 13, 70, 121). Roger Chaney told Mrs. Arley that he did not have a Nevada license but that they would attempt to broker the insurance for her (Tr. 105). Chaney told Mrs. Arley he would take care of the coverage but does not recall ever advising her of the name of any particular company (Tr. 68, 80, 81, 90). Thereafter Chaney made inquiry as to how he might place the insurance and share in the commission and called other agents and brokers about placing the coverage (Tr. 70, 71, 124).

On the morning of January 16, 1963, Mrs. Arley called Chaney and advised him that there had been a fire loss on the Verdi, Nevada property and inquired as to whether Chaney had put insurance on it (Tr. 73). Later that day, Chaney called Mrs. Arley back and advised her that he had placed fire insurance on the property (Tr. 74). *In fact Chaney had not placed insurance on the property* (Tr. 72, 73, 74, 75).

Subsequent to being advised of the loss on January 17, 1963, Chaney submitted an application for insurance to the United Pacific Insurance Company. The application did not indicate in any manner that the property had been previously damaged by fire (Tr. 76).

Thereafter and some time in March, 1963, appellants received United Pacific Insurance Company Policy No. F-78185 (Exhibit No. 52). That at the time this policy was processed, the United Pacific employees handling the application did not know that the Arley property

had been previously destroyed by fire (Tr. 131, 143, 151, 202). The Company would not have processed the application had it know of the loss (Tr. 202).

Thereafter Roger Chaney on March 5, 1963, without the knowledge of United Pacific Insurance Company, contacted Mr. Marks of General Adjustment Bureau in Reno, Nevada, to inspect the damaged premises (Tr. 167, 177).

On April 2, 1963, United Pacific Insurance Company wrote appellants denying coverage (plaintiff's Exhibit 56).

Appellee denies that the court erred as urged in appellant's specifications of error.

BASIC ISSUES

It is undisputed that the fire insurance policy in question was not delivered to the Arleys until after the property had been lost by fire. *The law is clear that if this policy was not applied for until after the loss, then it is void.* The basic question is: Was the insurance policy ordered prior to the time of the fire? In order to determine this question the jury had to decide: Was Chaney during the discussions with Mrs. Arley on the 30th or 31st of October, 1962, acting for the Arleys or for the United Pacific Insurance Company?

ARGUMENT

I

Roger Chaney Acted as the Agent or Broker for the Arleys During the Course of Dealings in Question.

There is ample evidence to support the verdict of the jury.

The factors to be considered by the jury were amply set forth by the Court's instructions. The Court on this issue instructed (Tr. 258):

> "Now the principal issue to be decided by you in this case under the issues as formulated is whether Chaney, who had been named as solicitor by the Nelson Company, was during Chaney's discussions with Mrs. Arley on the 30th or 31st of October, 1962, acting for the defendants or was he acting for the plaintiff in the course and scope of his authority as a solicitor for Nelson? * * *"

The Court further amplified this by instructing (Tr. 261):

> "If on the other hand you find that Chaney on or about October 30th or 31st, 1962, while acting within the scope of his authority with the Nelson Company, represented to the defendant Mrs. Arley that the buildings owned by the defendants near Verdi, Nevada, were covered by fire insurance and named the United Pacific Insurance Company as the fire insurance company that would issue the policy and that the amount and date of the coverage was definite and that the issuance of the policy here in question was the outgrowth of said repre-

sentations, if any, then and in that event your verdict should be in favor of the defendants on the issues here presented."

The evidence sustaining the verdict is as follows:

At the time that Chaney first began handling insurance matters for the Arleys he was in no way connected with United Pacific Insurance Company (Tr. 59) and the coverage that he had obtained in the past for the Arleys was through companies other than United Pacific (Tr. 61, 62).

At the time of the dealings in question, Chaney had disposed of his own agency and was employed as a solicitor by the Larry Nelson Agency *and his employer, Larry Nelson, had specifically instructed Chaney that he could not write the coverage for the Arleys* (Tr. 13, 70).

Chaney and the Nelson Agency represented various companies other than United Pacific (Tr. 9).

After the conversations with the Arleys in the fall of 1962, *Chaney attempted to broker the insurance coverage through other sources* (Tr. 13, 70, 71, 124). *Chaney advised Mrs. Arley that he did not have a Nevada license but that they would attempt to broker the insurance for her* (Tr. 105).

Chaney did not recall ever advising Mrs. Arley the name of any particular company (Tr. 68, 80, 81, 90). This was disputed by Mrs. Arley but it was a question of fact properly determined by the jury.

The fact that Roger Chaney was not acting on be-

half of United Pacific but in fact was attempting to broker the coverage through other companies is supported by the testimony of an independent witness, John Smith, who testified (Tr. 124):

> "Q. Were you ever requested in '62 to write fire insurance on property for Mrs. Arley in the Reno, Nevada area?
>
> A. Mr. Chaney asked me if I could broker it for him—
>
> MR. PETERSON: Objected to, your Honor, as hearsay as far as the defendants are concerned. I think it is incompetent.
>
> THE COURT: The conversation itself would be. You can answer the question Yes or No.
>
> THE WITNESS: Yes.
>
> MR. PETERSON: I move to strike the answer as given.
>
> THE COURT: The motion is denied.
>
> By MR. ROBERTS:
>
> Q. Who asked you?
>
> A. Roger Chaney."

II

The Fact That an Insurance Agent Is Licensed in the State of Oregon to Represent Named Insurance Companies Does Not Preclude Such Agent From Acting as an Agent or Broker for an Insured.

It is well established in the State of Oregon that a general insurance agent may act as an agent or broker on behalf of an insured. In so doing, such agent or broker assumes duties and responsibilities to his principal, i.e., the insured.

In *Hamacher* v. *Tumy,* 222 Or. 341, 347, 352 P.2d 493, 496 (1960), an action was brought against a gen-

eral insurance agent for failure to procure insurance. The Oregon court stated:

> "The parties are in agreement upon the general proposition that an insurance broker who is employed as agent by the insured to procure insurance owes a duty to his principal to exercise reasonable skill and care to obtain the insurance coverage ordered by his principal."

See also *Rodgers Insurance Agency* v. *Anderson Machinery,* 211 Or. 459, 468, 316 P.2d 497, 501 (1957) wherein it was stated:

> "* * * an insurance agent or broker who for a consideration agrees to procure insurance for another will be liable for any damage resulting from an unjustifiable breach of the agreement."

Therefore, it seems clear that an insurance agent in Oregon may in fact be acting as a broker on behalf of the insured. This is so, even though there is no specific statutory provision for the licensing of brokers. This would merely be a common law arrangement of principal and agent, that is, the insurance agent being the agent of the insured.

This proposition is not unique and is consistent with the statutory laws of the State of Nevada. The Nevada statutes provide that a policy may be negotiated by a licensed nonresident agent or broker. N.R.S. 684.350. "Nonresident broker" is defined by N.R.S. 684.020, subsection (4) as:

> "* * * any person * * * not a resident * * * who, for money, commissions, brokerage or anything of value acts or aids in any manner in any solicita-

tion or negotiation on *behalf of the insured, of contracts* * * *." (Emphasis added)

Appellants state, on page 47 of their brief, that Roger Chaney had previously written insurance on Nevada properties without a Nevada license (Citing Tr. 114 through 116). An examination of the transcript reveals that at the time referred to Chaney was writing insurance for Standard Accident and at that time was not an agent or solicitor for United Pacific Insurance Company.

The question of whether or not an insurance agent licensed in the State of Oregon can write insurance on properties outside the State is not in question. The question is merely whether the person so procuring insurance is acting as the agent of an insurance company or as the agent or broker for the insured. The fact that Chaney was not the holder of a nonresident agent's or broker's license in Nevada for the United Pacific Insurance Company was evidence that he was acting on behalf of the assureds rather than on behalf of the company.

In *Hardwick* v. *State Insurance Company,* 20 Or. 547, 26 Pac. 840 (1891) cited by the appellants, the question of agency was merely held to be a fact question for the jury to determine.

In *Hahn* v. *Guardian Assur. Co.,* 23 Or. 576, 32 Pac. 683 (1893), the question for determination was whether or not the insurance agent was acting on behalf of the insurance company. In that case the agent had held

himself out as the agent of the company and there was no notice to the assureds of any limitation of his authority. Here the evidence is consistent with the verdict of the jury that Chaney was acting on behalf of the Arleys rather than United Pacific Insurance Company.

III

If No Contract of Insurance Was Entered Into Prior to the Time of the Fire, Then the Policy Subsequently Issued Was Void

The facts are undisputed that (1) a fire occurred on the evening of January 15 or early morning of January 16, 1963 (R. 54); (2) that Mrs. Arley knew of the fire and notified Roger Chaney (Tr. 73); and (3) Roger Chaney, possessing this knowledge, attempted for the first time to effect antedated fire coverage to January 12, 1963, by ordering a policy from United Pacific (Tr. 76).

United Pacific has absolutely no liability under the alleged contract which is void ab initio. This was not a renewal of an existing policy.

An agent has no authority to attempt to effect insurance upon property already destroyed and a fire policy written after a loss is not a valid insurance contract. *Gambleman* v. *Mercantile Insurance Company of America,* 90 F. Supp. 472 (D.C. S.D. Cal. 1950); *Celina Mutual Casualty Co.* v. *Baldridge,* 313 Ind. 198, 10 N.E.2d 904 (1937); *Hopkins* v. *Phoenix Fire Insurance Company,* 200 Ky. 365, 254 S.W. 1041 (1923).

In 16 *Appleman Insurance Law Practice,* § 9163, 703 General Rules, it is stated:

> "An agent of an insurance company generally has no authority to bind his principal by attempting to insure property already destroyed. The filling in and delivery of a policy on property known to be already destroyed cannot be treated as a ratification of a prior imperfect contract to insure, ratification by an agent after knowledge of a fire being unauthorized."

In *Waterloo Lumber Company* v. *Des Moines Insurance Company,* 158 Iowa 563, 138 N.W. 504, 506 (1912), the Iowa court stated:

> "It has frequently been held that an agent has no authority to insure property already destroyed and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered or brought to the notice of the property owner until after loss, is not a valid contract of insurance."

See also *United States Casualty Co.* v. *Rodriguez,* 288 S.W. 487, (Tex. Civ. App. 1926); *Clark* v. *Insurance Company of North America,* 89 Me. 26, 35 Atl. 1008 (1896); *Hopkins* v. *Phoenix Fire Insurance Co.,* supra; *Alliance Insurance Co.* v. *Continental Gin Co.,* 285 S.W. 257 (Tex. Com. App. 1926); *Sholund* v. *Detroit Fire & Marine Ins. Co.,* 172 Wn. 111, 19 P.2d 395 (1933); *Royal Ins. Co. Ltd.* v. *Smith,* 77 F.2d 157 (C.A. 9 1935); *Ernest* v. *State,* 40 Ala. App. 344, 113 So. 2d 517 (1959).

Thus, if there was no previous contract of insurance between Arleys and United Pacific Insurance Company, no valid contract of insurance could have been entered into subsequent to the date of the fire irrespective of whose agent Chaney was on that date.

PROCEDURAL ISSUES

IV

Venue Was Properly Laid in The District of Oregon.

The record is clear that the Arleys have resided in Portland, Oregon, since 1958 (Tr. 179). Mr. Arley was employed in Portland by the Montag Furnace Company and maintained his bank account in Portland (Tr. 180, 181). Their automobiles are licensed in Oregon (Tr. 180).

Citizenship for diversity purposes means domicile. *Seideman* v. *Hamilton,* 173 F. Supp. 641 (D.C. Penn. 1959). The domicile of the wife is generally considered to be that of her husband. *Seideman* v. *Hamilton,* supra; *Price* v. *Greenway,* 167 F.2d 196 (C.A. 3 1948); Restatement, Conflict of Laws, § 27 (1934).

V

The Court Properly Submitted The Case to the Jury as an Action for Declaratory Judgment.

It is remarkable that the appellants now urge that the Court erred by treating this case as one for declaratory judgment and submitting it to a jury when this was the expressed desire of appellants throughout the pleading and pretrial procedure.

The appellants in Paragraph X of the pretrial order (R. 58) stated: "If defendants are compelled by this

Court to file a counterclaim the issues raised by said counterclaim and any assertable defenses thereto are triable by jury as a matter of right prior to any determination of the issues raised in plaintiff's suit."

The Court in compliance with the appellant's demands at the commencement of the trial advised (Tr. 2) "I feel that under the declaratory judgment statute you have a right to a jury trial on any issues of fact. That is what you are going to get. You are going to get a jury trial on that. * * *"

The appellants have urged that they were prejudiced by the Court trying the matter of agency and liability under the policy as a segregated issue pursuant to Rule 42(b) of the Federal Rules of Civil Procedure.

The question of the agency of Roger Chaney was common both to the appellants' counterclaim and the appellee's action for rescission of the policy or defense to the counterclaim. The action followed by the Court in this case was consistent with Rule 42(b) and is an example of the application of such rule to simplify the issues and avoid protracted litigation.

The submission of these matters to the jury preserved the appellants' rights to trial by jury and makes moot their claim as to which issue should have precedence in the trial.

Appellants' reliance upon *Bruckman* v. *Hollzer,* 152 F.2d 730 (C.A. 9 1946) and *Beacon Theatres Inc.* v. *Westover,* 79 Sup. Ct. 948, 350 U.S. 500 (1959) is misplaced as the thrust of each case was the denial of

a right to trial by jury. Here the Court did submit the matter to a jury. In fact, the *Beacon* case is illustrative of the liberal use that should be made of Rule 42(b). The Supreme Court in that case stated at page 955:

> "Under the Federal Rules the same Court may try both legal and equitable causes in the same action. Fed. Rules of Civ. Proc. 1, 2, 18. Thus any defenses equitable or legal, Fox may have to charges of antitrust violations can be raised either in its suit for declaratory relief or in answer to Beacon's counterclaim. * * * In this way the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue."

Appellants further argue that the Court erred in failing to stay the action in Oregon and transfer the proceedings to Nevada. The cases cited by the appellants involved in each instance an exercise of the sound discretion by the Court as to whether or not it should retain jurisdiction. Generally in the cases where jurisdiction was declined there had been a previous action pending in the other district.

Here the Court properly exercised its discretion in retaining jurisdiction in Oregon—where the controversy on the fire coverage was first litigated. At the time of appellants' motion (R. 36, 37) the District Court in Nevada had previously stayed the Nevada proceedings. This is reflected in the Court's ruling (R. 41, 42):

> "* * * Further the proceedings in this cause have progressed to the stage where a pretrial order has been prepared and the cause seems to be at issue and ready for trial. On the other hand, the

> action in the District Court for the District of Nevada is not at issue, the Nevada Court on the 15th day of April, 1964, having entered an order granting a stay of proceedings on account of the pendency of this action, * * *."

Considering the state of the record, the fact that the principal parties, i.e., Mr. and Mrs. Arley and principal witnesses, i.e., Roger Chaney, Larry Nelson, John Smith, Linda Upton, Robert Mohlere and A. D. Reinhardt, resided in this district, the Court was entirely within its discretion in retaining jurisdicton.

The appellants have complained that the complaint was entitled as one in equity for rescission and that therefore the subsequent legal action filed in Nevada should take precedence. The Federal Rules of Civil Procedure, Rule 2, Provide that there should be one form of action to be known as a civil action.

The only distinction of substance remaining between actions at law and suits in equity is in determining whether a party is entitled as a matter of right to trial by jury. *Chichester* v. *Kramer,* 157 F. Supp. 79 (D.C. N.Y. 1957). Here this question is moot as the jury determined all facts involved in the segregated trial.

Upon learning the true facts the course of United Pacific Insurance Company was clear. It must act with dispatch so as to not mislead the appellants and to avoid waiving its rights to relief. Speedy determination of the controversy was for the benefit of all parties concerned.

The jurisdiction of this Court to entertain the ac-

tion by United Pacific is clear as the State of Oregon has recognized mistake as the basis for rescission. *State Highway Commission* v. *State Construction Co.,* 203 Or. 414, 280 P.2d 370 (1955); *G. E. Supply Corporation* v. *Republic Construction Corp.,* 201 Or. 690, 272 P.2d 201 (1954).

In *Parker* v. *Title and Trust Company,* 233 F.2d 505 (C.A. 9, 1956), the District Court in Oregon took jurisdiction of an equity suit for rescission of a title insurance policy. In affirming the retention of jurisdiction the appellate court stated at page 508:

> "In the first place, the title company clearly acted under a mistake of fact and in ignorance of the very material lack of title to lot 2. This was a case of unilateral mistake, but the mistake was known to the Parkers who were fully aware that it concerned a matter so vital that the policy would not have been issued were it not for the mistake. The Supreme Court of Oregon has held that under such circumstances a contract is subject to cancellation in equity."

From the very beginning the appellee has contended that it would not have issued the policy of insurance if the appellants had disclosed the damage to the property (R. 2) and that the policy of insurance issued by the appellee was issued and executed under a mistake of fact as to the existence of the subject matter (R. 3).

Appellee contended in the pretrial order (R. 55, 56) "That the policy of insurance was issued by the plaintiff under a mistake of fact. Plaintiff believing that said

property was in existence and in good condition at the time the policy was requested."

There is no question that the Arleys knew that the property had been previously destroyed on January 17th when the application for insurance was submitted to the United Pacific Insurance Company by Roger Chaney (Tr. 73).

The cases cited by appellants for the proposition that the Court should have declined jurisdiction are cases in which rescission was sought solely on the grounds of fraud in the procurement of the policy.

THE INSTRUCTIONS

VI

The Court Properly Instructed the Jury as to the Elements Required to Establish an Oral Contract of Insurance.

We fail to understand appellants' argument under Point VII as directed to specification of error numbers 33 and 38. The language used by the court in giving its instruction as to the naming of United Pacific Insurance Company (appellants' specification of error 38) is identical to the language requested by the appellants in its alternative instruction No. 3 (specification of error 33) in respect to the naming of the insurance company.

But in any event, no error was committed by the court in its instruction in this respect. It is well established that there are certain stringent standards requi-

site to proof of an oral contract of insurance. The parties must agree to certain minimal terms including the name of the insurer, the amount of the premium, specification of the risk and the duration of the risk. The minds of the parties must meet intending to make a valid oral contract. 12 *Appleman Insurance Law Practice,* § 7196, p. 270; *Cerino* v. *Oregon Physicians Service,* 202 Or. 474, 484 et seq., 276 P.2d 397 (1954); *Bird* v. *Central Manufacturers Mutual Insurance Co.,* 168 Or. 1, 120 P.2d 753 (1942); *Cleveland Oil Co.* v. *Norwich Ins. Society,* 34 Or. 228, 55 Pac. 435 (1898).

The law in the State of Oregon is more stringent in respect to fire insurance policies than other types of insurance. In *Salquist* v. *Oregon Fire Relief Assn.,* 100 Or. 416, 197 Pac. 312 (1921) the Oregon Supreme Court held that oral contracts of fire insurance were not binding because of the statutory requirement (now O.R.S. 744.100) that specific forms of provisions must be incorporated in all fire policies as a prerequisite to validity. This was cited in the more recent case of *Mock et al* v. *Glens Falls Indemnity Co.,* 210 Or. 71, 80, 309 P.2d 180, 184 (1957) to the effect:

> "It is settled that a sufficiently definite oral agreement of insurance, by a general agent, is valid in this state * * * at least in the absence of a required statutory form of policy (*Salquist* v. *Oregon Fire Relief Assn.* * * *)."

In any event when an agent represents more than one insurance company none of them is bound by oral contract until the agent allocates the risk. *Sholund* v. *Detroit Fire & Marine Ins. Co.,* supra. Here Chaney at-

tempted to broker the insurance through other companies (Tr. 13, 70, 71, 124) and it was *not until after the loss* that he attempted to bind United Pacific (Tr. 75).

VII

The Court Correctly Instructed the Jury and Appellants' Specification of Error 30, 31, 32, 34, 35, 36, 37 and 39 Are Without Foundation.

Appellants' requested instructions No. 1 and No. 2 (specification of error 30, 32) do not correctly state the law. Certain minimal terms must be set forth including name of insurer, premium, risk, and duration. *Cerino* v. *Oregon Physicians Service,* supra; *Bird* v. *Central Manufacturers Mutual Insurance Co.,* supra; *Cleveland Oil Co.* v. *Norwich Ins. Society,* supra; 12 *Appleman Insurance Law Practice* Sec. 7199, p. 285.

No error was committed in failing to give appellants' instruction No. 2 (specification of error 31). Roger Chaney did not receive a commission from United Pacific (Tr. 70) as contrasted with *Williams* v. *Pacific States Fire Ins. Co.,* 120 Or. 1, 251 Pac. 258 (1926) cited by appellants. That case held that agency was a fact question for the jury.

The appellants' requested instruction No. 4 (specification of error 34) does not correctly state the law. If the loss occurred prior to application or issuance of the policy, such policy is void. See Point III of appellee's argument.

The Court's outline of the plaintiff's contention (ap-

pellants' specification of error 35) is consistent with the pretrial order (R. 56). The date was misstated as the 16th rather than the 17th. The Court offered to reinstruct the jury but the appellants stated they were not making an issue of this (Tr. 267). There is no evidence that Nelson knew that Chaney filed the application with United Pacific without disclosing the loss (Tr. 16).

In respect to specification of error 36, if the use of the word "broker" was error it was cured by the Court's instruction "* * * Whenever I mentioned 'broker' during the course of the instructions you will consider that I was speaking of an agent."

Specification of error 37 is not well taken. Avoidance of the policy for "wilful concealment" of a material fact is an express provision of the insurance contract (R. 5). The fact that Nelson may have known of the loss does not affect the result, as even a general agent has no authority to place insurance on property previously destroyed. However, Nelson did not know that Chaney submitted an application without disclosing that the property had been damaged (Tr. 16).

Appellants in specification of error 39 urge that the Court's comments on the evidence was an erroneous statement as to the law of brokerage. No authority is needed for the proposition that a trial judge in a federal court has broad discretion in his powers to comment on the evidence. However, the appellants have misinterpreted the Court's comments. The evidence mentioned certainly had to be considered by the jury in determining whether Chaney had in fact placed coverage with United

Pacific Insurance Company prior to the loss. This was properly considered by the jury and the jury found for the appellee.

CONCLUSION

Appellee respectfully submits that: (1) the evidence supports the Verdict of the jury.

(2) that the instructions of the Court properly framed the issues to be considered. That the evidence supports the conclusion that Roger Chaney during the period in question was acting as the agent of appellants and not of appellee, and that there was no contract of insurance between Arleys and United Pacific in effect prior to the fire.

(3) that as a matter of law the insurance policy which was issued subsequent to the loss was void and of no force and effect.

That the verdict and judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON and
KENNETH E. ROBERTS and
ROCKNE GILL
Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROCKNE GILL
Of Attorneys for Appellee